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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

TERESA CORTEZ, Plaintiff and Appellant, v. CITY OF HUNTINGTON PARK, Defendant and Respondent.	B205044 (Los Angeles County Super. Ct. No. VC047820)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed.

DeWitt, Algorri & Algorri, Mark S. Algorri and A. Lucy Mazloumian for Plaintiff and Appellant.

Leal ▪ Trejo, C. David Trejo and Ruth Diep for Defendant and Respondent.

* * * * * *

Plaintiff and appellant Teresa Cortez appeals from a grant of summary judgment in favor of defendant and respondent the City of Huntington Park (City). Appellant sued the City for damages after she tripped on a sidewalk. The trial court ruled that summary judgment was warranted on the grounds that the sidewalk defect was trivial as a matter of law and that the City lacked notice of any defect. We affirm. The undisputed evidence showed that the one-half to three-fourths inch height differential in the sidewalk was a trivial defect and, alternatively, that the City lacked notice of any defect.

FACTUAL AND PROCEDURAL BACKGROUND

On June 6, 2006, appellant was walking on the sidewalk in a commercial area, on her way to pick up her granddaughter from school. As she was walking in the middle of the sidewalk, looking straight ahead, she tripped and fell. Her foot had hit a raised area of the sidewalk, which appellant estimated was approximately one-half inch higher than the rest of the sidewalk.

Paramedics arrived to treat appellant, who had injured her left shoulder and cut her left eyebrow, and police officers investigated the incident. Huntington Park Police Department Officer Magallanes observed the area where appellant had fallen and saw an approximate one and one-half inch rise in the uneven portion of the sidewalk. Jorge Rouret, the City's public works maintenance supervisor in the department of field services, later examined the area and saw that a one-fourth inch rise began approximately three feet into the eight-foot wide sidewalk, rising to approximately one and one-fourth inches at the edge of the sidewalk. In a subsequent report he prepared about the incident, Rouret stated that the raised area ranged from one-half inch to one and one-half inches high. In his deposition, he also characterized the area as "probably an unsafe condition." It appeared to him that the difference in elevation was not something that would have happened overnight.

Before appellant fell, the City had not received any complaints about the sidewalk at that location. Due in part to limited staffing, the City did not have regularly scheduled inspections of public property to check for dangerous conditions. Though appellant had

used that route several times, she had never previously noticed the raised portion of the sidewalk. Miguel Gutierrez, who saw appellant trip, stated that others had previously tripped in the same area.

Appellant filed a complaint for damages against the City in December 2006. The City answered in February 2007, generally denying the allegations and asserting several affirmative defenses.

In August 2007, the City moved for summary judgment on the ground that appellant could not establish certain requisite elements of her claim—namely, that there was a dangerous condition of public property and, alternatively, that the City had actual or constructive notice of such dangerous condition. In support of the motion, the City offered excerpts of appellant's deposition, the police report about the incident, photographs of the sidewalk and Rouret's declaration.

Appellant opposed the motion, asserting that whether a dangerous condition existed and whether the City had constructive notice of the condition were both triable issues of material fact. She submitted excerpts of her deposition, the police report and a report Rouret prepared about the incident, excerpts of Rouret's deposition and an excerpt of Gutierrez's deposition. She also filed evidentiary objections to portions of the City's evidence.

Following a November 5, 2007 hearing, the trial court issued an order granting the motion. It ruled that the undisputed evidence established the defect in the sidewalk was trivial as a matter of law, and therefore not actionable as a dangerous condition of public property. It further ruled that there was no evidence creating a triable issue of fact as to whether the City had actual or constructive notice of any defect. Finally, it overruled appellant's evidentiary objections.

Appellant appealed from the order granting summary judgment. Thereafter, the trial court entered judgment in favor of the City. In the interests of justice and to avoid delay, we deem the notice of appeal to have been filed after entry of judgment. (Cal. Rules of Court, rule 8.104(e); *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 288 ["when the order [granting summary judgment] is followed by a

judgment, the appellate court may deem the premature notice of appeal to have been filed after the entry of judgment"].)

DISCUSSION

Appellant challenges the trial court's grant of summary judgment, asserting that triable issues of material fact existed with respect to the existence of a dangerous condition and notice.[1] We disagree.

I. Standard of Review.

We review a grant of summary judgment de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843–857.) Summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (Code Civ. Proc., § 437c, subd. (c).) We consider "'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) "In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261).)

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[1] Appellant also contends that the motion was untimely because it was originally submitted with Rouret's unsigned declaration and later amended to add his signature. Though appellant raised this issue in her opposition papers, she did not object on this basis at the hearing. Accordingly, we deem her objection waived. (Code Civ. Proc., § 437c, subd. (d).)

II. The Undisputed Evidence Established That the Height Differential in the Sidewalk Was a Trivial Defect As a Matter of Law.

"[T]ort liability for governmental entities is based on statute." (*Guerrero v. South Bay Union School Dist.* (2003) 114 Cal.App.4th 264, 273.) The Tort Claims Act imposes government tort liability in three general categories—one being where there is a dangerous condition on property owned or controlled by the public entity. (Gov. Code, § 835.) A condition is "dangerous" if it creates a "substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used." (Gov. Code, § 830, subd. (a).) Conversely, the trivial-defect doctrine, codified in Government Code section 830.2, provides that a condition is "not a dangerous condition," if "the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property . . . was used with due care" in a reasonably foreseeable manner. "The rule which permits a court to determine 'triviality' as a matter of law rather than always submitting the issue to a jury provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property." (*Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 399.)

"The trivial defect doctrine is not an affirmative defense. It is an aspect of a landowner's duty which a plaintiff must plead and prove. [Citation.] The doctrine permits a court to determine whether a defect is trivial as a matter of law, rather than submitting the question to a jury. [Citation.] 'Where reasonable minds can reach only one conclusion—that there was no substantial risk of injury—the issue is a question of law, properly resolved by way of summary judgment.' [Citations.]" (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 567; accord, *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 234.)

In determining whether a defect is trivial as a matter of law, although the size of the defect may be one of the most relevant factors to the decision, it is not the only criterion that should be considered. (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 734.) "Instead, the court should determine whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract depth would indicate." (*Ibid*.) For example, in deciding whether a cracked walkway constituted a trivial defect "the court should consider whether the walkway had any broken pieces or jagged edges and other conditions of the walkway surrounding the defect, such as whether there was debris, grease or water concealing the defect, as well as whether the accident occurred at night in an unlighted area or some other condition obstructed a pedestrian's view of the defect." (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927.)

Several cases have examined defects in floors and sidewalks, and concluded that elevation changes of approximately one inch or less, in the absence of any other aggravating factors, are trivial as a matter of law and not a basis for imposing liability. *Fielder v. City of Glendale, supra,* 71 Cal.App.3d 719 is illustrative. There, the plaintiff tripped on the raised edge of a sidewalk which was six to seven feet wide and varied in height from zero to as much as an inch. (*Id*. at p. 721.) The court held the height differential was a trivial defect as a matter of law, noting that "[t]he only evidence presented as to the dangerousness of the defect was the evidence of the depth of the depression" (*id*. at p. 732) and "there was no evidence of any aggravating circumstances or factors which might have increased the dangerousness of the defect." (*Id.* at p. 726.) Other cases are in accord. (E.g., *Ursino v. Big Boy Restaurants, supra,* 192 Cal.App.3d at pp. 396–398 [three-fourths inch differential between two sidewalk slabs held a trivial defect as a matter of law]; *Ness v. City of San Diego* (1956) 144 Cal.App.2d 668, 673 [seven-eighths inch differential between two sidewalk slabs held a trivial defect as a matter of law]; see also *Whiting v. City of National City* (1937) 9 Cal.2d 163, 165–166 [three-fourths inch differential in sidewalk elevation too trivial to impart constructive notice].)

Here, the trial court properly concluded that the undisputed evidence established that the size of differential between the sidewalk slabs was trivial as a matter of law and that there were no aggravating factors creating a dangerous condition. The undisputed evidence showed that the sidewalk differential was approximately one-half inch. According to appellant's deposition testimony, she was walking in the middle of the sidewalk when she tripped over a raised area which she estimated to be approximately one-half inch high. Her size estimate corresponded with Rouret's. After examining the area, Rouret testified that a one-fourth inch rise began approximately three feet into the eight-foot wide sidewalk and rose to approximately one and one-fourth inches at the other edge. Even using the figures from Rouret's written report, which were approximately one-fourth inch higher, the area where appellant tripped would have been no greater than three-fourths inch high. According to California law, this differential was trivial as a matter of law.

Nor were there any aggravating circumstances creating a triable issue of fact as to whether the differential was a dangerous condition. The undisputed evidence showed that appellant had walked that route several times previously without incident. On the afternoon that appellant fell, the weather was clear and there was no evidence that her view of the sidewalk was obstructed. Thus, the evidence did not show there were "additional factors present which could have made the defect more dangerous than it would appear in the abstract due to its mere depth." (*Fielder v. City of Glendale, supra,* 71 Cal.App.3d at p. 732.)

We find no merit to appellant's arguments that the evidence established a triable issue of fact. First, appellant contends that the trial court should not have considered her deposition testimony that the raised sidewalk edge was only one-half inch high because she was not looking down at the time she fell and for a host of other reasons relating to her ethnicity and education level which are not a part of the record. But appellant never made any attempt to correct her deposition testimony, nor did counsel object to her characterization at the deposition. Moreover, her estimate was consistent with Rouret's

inspection. Accordingly, the trial court properly considered appellant's testimony as part of the undisputed evidence.

Second, appellant contends Rouret's comment that the condition was "unsafe" created a triable issue as to its dangerousness. In response to the question "But it was your thought that perhaps this was a dangerous condition?" Rouret responded "I'm not going to say that it was a dangerous condition; probably an unsafe condition. And we tried—we took care of it." Addressing similar comments by an expert witness opining about the condition of a stairway at an oblique angle, the court in *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 705, observed "the fact that a witness can be found to opine that such a condition constitutes a significant risk and a dangerous condition does not eliminate this court's statutory task, pursuant to [Government Code] section 830.2, of independently evaluating the circumstances." Accordingly, notwithstanding the expert witness's opinion, the court there ruled that the stairway design was a trivial defect as a matter of law. (*Ibid*.) Likewise, in view of the undisputed evidence concerning the condition of the sidewalk, Rouret's comment did not suffice to create a triable issue of fact.

Finally, appellant contends that the evidence established the existence of aggravating factors sufficient to create a triable issue of fact. But the only factors cited by appellant contained in the record were that appellant was not looking down at the time she tripped and that her glasses fell off when she fell. This evidence is unlike that held sufficient to establish dangerousness. For example, in the case cited by appellant, *Johnson v. City of Palo Alto* (1962) 199 Cal.App.2d 148, superseded by statue on other grounds as stated in *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 831, the court found that reasonable minds could differ as to whether a one-half to five-eighths inch sidewalk differential was dangerous where this was the plaintiff's first time on the sidewalk, the accident occurred at night and overhead trees also made the sidewalk shadowy. (*Johnson v. City of Palo Alto*, *supra*, at p. 152.) Here, in contrast, appellant's evidence failed to demonstrate that external conditions obscured the sidewalk defect. Appellant also cited the jury award in favor of the plaintiff in *Barrett v. City of*

Claremont (1953) 41 Cal.2d 70, but neglected to mention that the Supreme Court reversed and directed that the defendant's motion for judgment should be granted on the ground that a one-half inch differential between sidewalk slabs was trivial as a matter of law, even where dirt had piled up in the differential so as to obscure it. (*Id.* at pp. 74–75.)

On the basis of the undisputed evidence before the trial court, we are guided by the court's observation in *Fielder v. City of Glendale, supra,* 71 Cal.App.3d at pages 725 to 726: "[W]here a sidewalk slab is raised in elevation by only about three-fourths of an inch, such a 'defect' is not dangerous as a matter of law. This is because it is impossible for a city to maintain its sidewalks in perfect condition. Minor defects nearly always have to exist. The city is not an insurer of the public ways against all defects. If a defect will generally cause no harm when one uses the sidewalk with ordinary care, then the city is not to be held liable if, in fact, injury does arise from the defect."

III. The Undisputed Evidence Established That the City Had Neither Actual Nor Constructive Notice of Any Defect.

Summary judgment was properly granted on the alternative ground that there was no evidence showing that the City had notice of any defect before appellant's fall. To establish liability for a dangerous condition, a plaintiff must prove that either: (1) "A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition," or (2) "The public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Gov. Code, § 835.) According to Government Code section 835.2, subdivision (b): "A public entity had constructive notice of a dangerous condition . . . only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

Pertinent here, the court in *Barone v. City of San Jose* (1978) 79 Cal.App.3d 284, 290, explained: "It is apparent therefore that the concept of 'dangerousness' is

necessarily included within the concept of constructive notice of the 'dangerous character' of defect. Obviously, a defect that is too 'minor, trivial or insignificant,' as a matter of law, to be dangerous could hardly impart notice of its dangerous character." (See also *Adams v. City of San Jose* (1958) 164 Cal.App.2d 665, 669 ["where the defect is minor, constructive notice does not follow from its existence over a period of time"].) Thus, the undisputed evidence establishing the trivial nature of sidewalk defect likewise established the City's lack of notice.

But even if there had been a triable issue as to the sidewalk defect's dangerousness, the undisputed evidence established a lack of notice. "There are a substantial number of cases holding that, although a particular defect may have created a dangerous or defective condition, it was not so conspicuous as to give the city constructive notice of its existence. [Citations.]" (*Gentekos v. City & County of S.F.* (1958) 163 Cal.App.2d 691, 698, superseded by statute on other grounds as stated in *Brown v. Poway Unified School Dist., supra,* 4 Cal.4th at p. 831.) In one case, *Nicholson v. City of Los Angeles* (1936) 5 Cal.2d 361, a sidewalk had cracked at one of the joints between the panels, creating a height differential of up to one and one-half inches. The defective condition had existed for several months before the plaintiff tripped and fell there. (*Id*. at pp. 362–363.) Operating under the assumption that the sidewalk defect was a dangerous condition, the court nonetheless concluded that the defect was not sufficiently conspicuous to have put the city on constructive notice. In reaching this conclusion, the court considered that there had been "no evidence of any prior event which would put the city on inquiry as to the existence of a dangerous break at this point . . . ." (*Id*. at p. 367.) The evidence, therefore, was "insufficient to sustain a finding that had the city fulfilled its duty of reasonable inspection and supervision of the streets of the city as a whole it would have had actual knowledge of the break." (*Ibid*.)

Here, likewise, beyond anecdotal evidence that others had tripped in the same vicinity, there was no evidence of a prior event that would have put the City on notice of the sidewalk defect. Furthermore, this was not the type of defect that a reasonable inspection would have disclosed. Certainly, "[a] municipality must exercise vigilance in

keeping its streets safe and is bound to make reasonable inspections to that end. [Citations.]" (*Peters v. City & County of San Francisco* (1953) 41 Cal.2d 419, 427–428.) But this does not mean that a municipality must inspect and maintain every inch of sidewalk within its jurisdiction. (See, e.g., *Barrett v. City of Claremont, supra,* 41 Cal.2d at p. 73 ["Growing out of the difficulty of maintaining heavily traveled surfaces in perfect condition is the practical recognition that minor defects inevitably occur, both in construction and maintenance, and that their continued existence is not unreasonable"]; *Graves v. Roman* (1952) 113 Cal.App.2d 584, 586–587 ["The authorities disclose that the underlying basis of the decisions [declining to impose liability for trivial defects] is a practical recognition of the impossibility of maintaining heavily travelled surfaces in a perfect condition and that minor defects such as differences in elevation are bound to occur in spite of the exercise of reasonable care by the party having the duty of maintaining the area involved"].)

Indeed, none of the cases cited by appellant involved a city's duty to inspect sidewalks. (See *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 303–304 [evidence showed constructive notice of two-foot long and three-inch deep pothole that was in a regularly inspected area and had existed for six months]; *Straughter v. State of California* (1976) 89 Cal.App.3d 102, 109–111 [evidence showed constructive notice of ice on roadway where state policy required continuous patrolling during freezing temperatures]; *Anderson v. County of San Joaquin* (1952) 110 Cal.App.2d 703, 706–707 [evidence showed constructive notice of two-foot long and two to six inch deep pothole that had existed for several months].) Here, the undisputed evidence showed that the City had not observed the sidewalk defect in the normal course of business, nor had anyone reported any incident prior to appellant's fall. Moreover, beyond Rouret's observation that the differential is not generally something that would appear overnight, there was no evidence regarding how long the sidewalk defect had existed. Accordingly, the trial court properly ruled there was no evidence creating a triable issue of fact concerning the City's actual or constructive notice of any sidewalk defect.

DISPOSITION

The judgment is affirmed. The City is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST